



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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MEMO

To: Chairman Foley and members of the Board of Environmental Protection

From: George M. MacDonald, Director, Sustainability Unit

Date: November 29, 2012

**Subject: Citizen's Petition to Initiate Rulemaking - DEP Rule Chapter 88 –
'Designation of Bisphenol A as a Priority Chemical and Regulation
of Bisphenol A in Children's Products'**

This memorandum is intended to assist the Board in preparing for its meeting on December 6. At that meeting, the Department will discuss with the Board and the Commissioner the legal framework associated with the analysis necessary in the rulemaking process. This rulemaking was initiated by the Board and the Commissioner after a Citizens' petition was received. The petitioned rulemaking is an overlay on the current work the DEP is undertaking regarding the assessment analyses required by the current rule to be reported to the BEP by January 1, 2013. The proposed language being considered by the Board and the Commissioner is the language proposed by the Citizens in that petition.

Roles of the Board, Commissioner and Department

This is a joint rulemaking between the Board and the Commissioner. All testimony, deliberative sessions and written materials, for example, are heard and considered by both the Board and the Commissioner.

The proposed language to be considered by the Board and the Commissioner includes:

- (1) a sales prohibition on infant formula and baby food which has BPA contained in its packaging,
- (2) a sales prohibition on toddler food which has BPA contained in its packaging,
- (3) a definition of the term toddler food, and
- (4) a definition of the term intentionally added.

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Since adopting a rule with a sales prohibition is a major substantive rule, the Board is charged with undertaking the rulemaking on the sales prohibition provisions. Rulemaking related to definitions under the law are routine technical and therefore the Commissioner is charged with undertaking rulemaking on the two provisions which are definitions.

The Department will provide technical support and recommendations on the rulemaking. This support and recommendations will be provided to the Board on the sales prohibition provisions and to the Commissioner on the definition provisions concurrently at a public meeting.

Action by the Board on the rulemaking

Procedurally, you have several options regarding adopting rules. The Board and the Commissioner may:

- adopt the rule as proposed by the petitioners,
- make changes to the proposed rule and adopt those changes, or
- choose to not adopt a rule.

If the Board or the Commissioner chooses to make changes to the rule, then the entire draft rule, with all changes by both the Board and the Commissioner, must go out for additional public comment.

Legal framework to be considered by the Board

The following questions will need to be addressed by the Board for each product category (infant formula, baby food, and toddler food). We will be available at the meeting to discuss with the Board further:

- (1) Does distribution of the children's product directly or indirectly expose children and vulnerable populations to BPA?
 - a. Is BPA present in the product?
 - b. Is there distribution of the product in Maine?
 - c. Does the use of the product expose children to BPA?

- (2) Are there one or more safer alternatives to BPA available at a comparable cost?
- a. Is there an alternative that, when compared to a priority chemical that it could replace, the alternative has not been shown to pose the same or greater potential for harm to human health or the environment as the priority chemical?
 - i. Is there evidence for the Board to review?
 1. Are there alternatives assessments that have been completed to assist the Board in answering this question?
 2. Is there other evidence in the record to assist the Board in answering this question?
 - ii. Are there safer alternatives?
 1. Has the Board considered the following factors?
 - a. The propensity of the chemical to be released from the product during use;
 - b. The likelihood that children will be exposed to the chemical as a result of its use in the product and the predicted magnitude of that exposure;
 - c. The persistence of the chemical and its tendency to bioaccumulate;
 - d. The potential human health effects from exposure to the chemical; and
 - e. The ecotoxicity of the chemical.
 2. Can the Board make the following presumptions?
 - a. Presume that an alternative is safer if the alternative does not contain a chemical of concern.
 - b. Presume that an alternative is both safer and available if:
 - i. The product containing the priority chemical has been banned by another U.S. state based on the availability of a safer alternative; or
 - iii. Are the safer alternatives available at comparable cost?
 1. Has the Board considered the following factors?
 - a. The extent to which the alternative currently is available in the marketplace;

- b. The affordability of the alternative as demonstrated by sales volumes;
 - c. The purchase price differential between the product containing the priority chemical and the alternative; and
 - d. In the case of an alternative that is not already offered for sale, information bearing on the ease with which the alternative could be substituted for the use of the priority chemical and introduced into the U.S. market.
2. Can the Board make the following presumptions?
- a. Presume that an alternative is available if the alternative is sold in the United States;
 - b. Presume that an alternative is both safer and available if:
 - i. The product containing the priority chemical has been banned by another U.S. state based on the availability of a safer alternative; or
 - ii. The product containing the priority chemical is an item of apparel or novelty.